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No. 758

IN THE

Supreme Court of the United States

(OCTOBER TERM 1949)

FRED M. CARTER and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Executors of the Last Will and Testament of SELINA C. CORNISH, Deceased,

Petitioners,

VS.

JANE M. HOEY, as Executrix of the Last Will and Testament of James J. Hoey, Deceased, formerly Collector of Internal Revenue of the United States of America for the Second District, New York, and REA FORHAN PEDRICK, as Administratrix of the Estate of William J. Pedrick, Deceased, formerly Collector of Internal Revenue of the United States of America for the Second District, New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

No.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, above named, respectfully pray for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a judgment of that Court made and entered in the Office of the Clerk thereof on the 30th day of January, 1950, affirming a judgment of the United States District Court for the Southern District of New York made and entered in the Office of the Clerk of that Court on the 10th day of May, 1949. The District

Court judgment, rendered after a trial without a jury, dismissed upon the merits the complaint in an action instituted by the petitioners to recover Federal income taxes imposed upon the Estate of Selina C. Cornish, deceased.

The Basis of this Court's Jurisdiction.

The judgment of the Court of Appeals was entered on January 30, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

The Question Presented, and the Statute Involved.

The question presented by this case and a companion case (*Charles Simon and ano. as Executors, etc.* v. *Jane M. Hoey, as Executrix, etc., and ano.*) is:

Whether capital gains received by an estate during the period of administration constitute income of the estate within the meaning of Section 162(c) of the Revenue Act of 1938; and if so, whether, if such capital gains be properly paid, during the taxable year in which received, to a residuary legatee, heir or beneficiary entitled thereto, the amount thereof is to be allowed as a deduction pursuant to that Section in computing the net income of the estate for that taxable year.

Section 162(c) of the Revenue Act of 1938 has been quoted in full at pages 2-3 of the petition in the *Simon* case to be presented herewith.

As in the companion case, it has been held below in this case that since, under New York law, capital gains are not considered to be income the deduction is not allowable under Section 162(c).

Statement of the Matter Involved.

As both this and the *Simon* case involve the same statutes, and were recognized both by counsel and the Courts below as presenting similar issues of law, and as the petition in the companion case contains a full presentation of the basic legal question common to both cases, it seems unnecessary to restate them. We therefore respectfully request that this Court regard the statement of the issues in the *Simon* petition as incorporated herein by reference.

The Facts.

This case concerns the estate of Selina C. Cornish, widow of Edward J. Cornish, whose estate is involved in the companion case.

The facts in this case also are not in dispute, but are somewhat more complicated than in the *Simon* case. For brevity's sake we shall not restate those facts involved in both actions which have already been stated in the petition in the *Simon* case, and beg leave to incorporate herein by reference the statement of facts therein contained.

Selina C. Cornish died on May 18, 1938, fifteen days after the death of her husband, and her Will and two Codicils were admitted to probate in the Surrogate's Court of Putnam County, New York, where she and her husband had resided, and where her husband's will was admitted. The petitioners are the Executors under the widow's Will.

By her Will Selina C. Cornish had left to her husband one-half of her residuary estate and the other half to trustees for charitable purposes (R. 56-59). Her husband having predeceased her she died intestate as to the one-half of the residuary estate left to him, and that one-half passed as her intestate property to her ten heirs-at-law and next-of-kin, known in New York as distributees (R. 73, 39).

The husband by his Will left his residuary estate to his widow and the latter, by a Second Codicil, bequeathed her interest in her husband's estate to the persons who would have taken it had her husband died intestate and had he survived her (R. 62). There were seven such persons, whom we shall hereinafter call the "Second Codicil legatees" (R. 38, 39). Neither the Will of Selina C. Cornish nor its two Codicils contained express provision for the disposition of income during the period of administration.

As a consequence the two estates were in process of administration in the same Court at the same time.

The capital gains amounting to $483,126.51, which are the subject matter of the companion case, were received by petitioners in this case from the Executors of the husband's will and, after deduction of a small capital loss incurred by petitioners, $480,915.01 thereof was duly paid out by petitioners in the taxable year in which received to the beneficiaries entitled thereto, i.e. the Second Codicil legatees, all during the period of administration of the Selina C. Cornish estate and as part of an interim distribution of that estate (R. 39, 42, 43; Schedules F-1, I-1, Plaintiffs' Exhibit 2-E, being the Intermediate Account of petitioners, a certified copy of which has been lodged with the Clerk of this Court, and the printing of which has been dispensed with for the purposes of this application by stipulation duly filed). Covering letters were sent by petitioners to the legatees describing the nature of the distribution. (Plaintiffs' Exhibits 2L-R, incl., R. 43, 101-118).

None of the gains of $504,378.95 realized by the Edward J. Cornish Executors, and out of which the payment of $483,126.51 was made to petitioners, arose between the dates of death of the two decedents (Plaintiffs' Exhibit 2-I, Schedule E, printing of which has also been dispensed with by stipulation filed herein).

The petitioners in this case, as Executors of the Will of Selina C. Cornish, themselves realized net short-term capital gains of $527,320.95 (R. 43) on sales of assets (other than those received under the Will of Mr. Cornish) during the period of administration, and duly paid them out to the proper beneficiaries in the taxable year in which received and as part of an interim distribution of the Selina C. Cornish estate (Schedules F, I, Plaintiffs' Exhibit 2-E). These capital gains were paid, one-half to the petitioners themselves as Trustees of the trust for charitable purposes above mentioned, and the other half to the ten persons who took by intestacy as the distributees of Selina C. Cornish (R. 185, 44). Again covering letters were sent by petitioners to the beneficiaries describing the nature of the distribution (Plaintiffs' Exhibits 2S-BB, R. 44, 45, 123-142).

The payments of capital gains above mentioned, both those received from the Edward J. Cornish Estate and those realized by the Selina C. Cornish Estate, were duly approved by the Surrogate's Court on settlement of the petitioners' Intermediate Account (R. 98).

It has been stipulated that all capital gains were at all times herein mentioned while in the hands of the petitioners identifiable and separable from all capital assets and from all other income of this Estate (R. 43, 44).

In their Federal income tax return for the tax year involved the petitioners, pursuant to a ruling of the Commissioner of Internal Revenue, did not deduct from the gross income of the Estate of Selina C. Cornish the capital gains distributed to the Selina C. Cornish distributees in the total sum of $263,660.47, and in further obedience to the ruling did not include as taxable income the $483,126.51 of capital gains received from the Edward J. Cornish Estate although their receipt was disclosed in the return. Petitioners paid the tax resulting from the inclusion in taxable income of gain resulting from sale or exchange of capital

assets other than assets received from the Edward J. Cornish Estate without prejudice and under protest.

Refund was demanded, was not allowed, and this action was commenced in due course.

Further Discussion of the Question Presented.

It is the wrongful disallowance by the Commissioner of Internal Revenue, and by the Courts below, of a deduction under Section 162(c) of the Revenue Act of 1938 for the amount of the capital gains so paid to the distributees of Selina C. Cornish which constitutes the matter involved on this petition. There is of course no difference relative to the construction of Section 162(c) between the case of a residuary estate passing to a named residuary legatee and the case of a residuary estate passing to intestate distributees. The Statute covers all of these by the phrase "any legatee, heir or beneficiary".

There is also involved herein the right of this estate to a deduction under Section 162(c) for the amount of the capital gains paid to the Second Codicil legatees. This comes about because, if the contentions of petitioners in this and the *Simon* case be sustained, the Selina C. Cornish Estate also received taxable income when it received payment of the $483,126.51 of capital gains disclosed in petitioners' income tax return as having been received from the Edward J. Cornish Estate. Reversal of the *Simon* judgment would constitute a determination to that effect. Consequently a recovery by the petitioners in this case could not be then granted unless this Court should also determine that the Estate of Selina C. Cornish was entitled to a deduction under Section 162(c) for the amount of those gains distributed to the Second Codicil legatees. As stated in the petition in the *Simon* case, in the event of judg-

ments for petitioners in these cases, deficiencies could still be assessed against the legatees under Section 3801 of the Internal Revenue Code.

Again there is no difference relative to the construction of Section 162(c) between the usual case of a residuary estate passing to a named residuary legatee and the factually somewhat unique case of a bequest of the residuary estate of another decedent to which the testatrix herself had become entitled. Mrs. Cornish died owning a property right in Mr. Cornish's residuary estate, and that was what she bequeathed to the Second Codicil legatees; that property right became enhanced in value after her death by subsequently arising increment in the form of capital gains. When the Second Codicil legatees ultimately received those gains they received taxable income from property acquired by bequest, and as such the gains were includable in their gross income.

This is not a case involving payment of estate income to an "ordinary" or pecuniary legatee in discharge of an "ordinary" or lump-sum bequest. On the contrary the Second Codicil legatees were legatees within the meaning of Section 162(c).

In passing it should be noted that the Commissioner has allowed petitioners a deduction for the $263,660.48 of capital gains paid to themselves as Trustees of the charitable trust under the Will of Selina C. Cornish. Presumably this was allowed under the provisions of Section 162(a) of the Revenue Act of 1938, giving a deduction to estates for the amount of the gross income thereof paid or permanently set aside for charitable purposes. Accordingly no question is now presented with respect to the deductibility under Section 162(c) of that payment.

The Opinion Below.

Neither the opinion of the District Judge nor the decision of the Court of Appeals, which affirmed on the opinion of the District Judge, has as yet been officially reported. The opinion of the District Judge appears in the Record at pages 188 to 191 inclusive. The decision of the Court of Appeals appears in the Record at page 201.

Reasons for Granting the Writ.

The reasons for granting the writ in this case are identical with those for granting the writ in the *Simon* case and we beg leave to incorporate herein by reference the statement thereof contained in the petition in that case. In addition it must be apparent from the foregoing statement in this case that complete justice could not be had if the writ were to be granted in only one of the cases.

From the foregoing statement it now clearly appears how the seventeen persons interested in this Estate and the Estate of Edward J. Cornish have been injured by the decisions below in the two cases. The $480,915.01 of the $483,126.51 of net capital gains which were paid by the petitioners herein to the seven Second Codicil legatees under the Will of Selina C. Cornish have all been taxed to the Estate of Edward J. Cornish, and the $263,660.47 of capital gains which were paid by the petitioners in this case to the ten distributees of Selina C. Cornish have all been taxed to this Estate. This unlawful artificial pyramiding into two taxable entities of the income of seventeen persons has resulted in serious injustice to those seventeen persons.

WHEREFORE your petitioners respectfully pray that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Second Circuit, to review

its judgment aforesaid, and that on such review the judgment of said Court of Appeals be reversed and judgment be directed in favor of the petitioners for the amount prayed for in the complaint, together with interest and petitioners' costs and disbursements.

Dated, April 14th, 1950.

FRED M. CARTER and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Executors of the Last Will and Testament of Selina C. Cornish, Deceased,
Petitioners,

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